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IN THE

Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER,
Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. APPELLANTS' PROPOSAL IS AN ABRUPT DEPARTURE FROM LONGSTANDING PRACTICE AND PRECEDENT 7

A. *Reynolds* Protects Equal Access to Representation 8

B. Consistent Precedent and Practice Confirm That *Reynolds* Protects Equal Access to Representation 11

II. APPELLANTS' PROPOSAL WOULD FENCE OUT HISTORICALLY DISFAVORED AND UNDERSERVED COMMUNITIES, AND THERFORE RAISES CONSTITUIONAL CONCERNS. 13

A. This Court's Jurisprudence Protects Against the Fencing Out of Select Communities. 15

B. Appellants' Proposal Does Not Have a Constitutional Value That Justifies Its Deleterious Effect on Representational Equality. 23

TABLE OF CONTENTS
(continued)

Page

III. THERE IS NO CONFLICT BETWEEN ONE PERSON, ONE VOTE AND SECTION 2 OF THE VOTING RIGHTS ACT. 25

A. In Principle, There Is No Conflict Between One Person, One Vote and Section 2..... 26

B. In Practice, There Is No Conflict Between One Person, One Vote and Section 2..... 29

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Abate v. Mundt,
403 U.S. 182 (1971) 22, 23, 33

Anderson v. Celebreeze,
460 U.S. 780 (1983) 16

Barnett v. City of Chi.,
141 F.3d 699 (7th Cir. 1998) 30

Bartlett v. Strickland,
556 U.S. 1 (2009) 28, 30

Bd. of Estimate of City of N.Y. v. Morris,
489 U.S. 688 (1989) 11, 24

Beer v. United States,
425 U.S. 130 (1976) 2

Branch v. Smith,
538 U.S. 254 (2003) 32

Brown v. Thomson,
462 U.S. 835 (1983) 32, 33

Burns v. Richardson,
384 U.S. 73 (1966) ..... *passim*

Bush v. Vera,
517 U.S. 952 (1996) 1, 34

Calderon v. City of L.A.,
481 P.2d 489 (Cal. 1971) 13

Carrington v. Rash,
380 U.S. 89 (1965) 15

Chapman v. Meier,
420 U.S. 1 (1975) 31

TABLE OF AUTHORITIES
(continued)

Page

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) 32

Chisom v. Roemer,
501 U.S. 380 (1991) 1

Dillard v. Chilton Cty. Bd. of Educ.,
699 F. Supp. 870 (M.D. Ala. 1988), *aff'd*,
868 F.2d 1274 (11th Cir. 1989) 32

Dillard v. Town of Louisville,
730 F. Supp. 1546 (M.D. Ala. 1990) 32

Easley v. Cromartie,
532 U.S. 234 (2001) 1

Ely v. Klahr,
403 U.S. 108 (1971) 18, 23

Fabela v. City of Farmers Branch, Tex.,
No. 10-1425, 2012 WL 3135545 (N.D.
Tex. Aug. 2, 2012) 31

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584 F.3d 660 (5th Cir. 2009) 31

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379 U.S. 433 (1965) 29

Gaffney v. Cummings,
412 U.S. 735 (1973) 4, 10, 12, 29

Garza v. Cty. of L.A.,
918 F.2d 763 (9th Cir. 1990) 31

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539 U.S. 461 (2003) 1

TABLE OF AUTHORITIES
(continued)

Page

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 2, 5, 15

Gray v. Sanders,
372 U.S. 368 (1963) 22

Hadley v. Junior Coll. Dist.,
397 U.S. 50 (1970) 23

Harper v. Va. State Bd. of Elections,
383 U.S. 663 (1966) 15

Holder v. Hall,
512 U.S. 874 (1994) 31, 33

Johnson v. DeGrandy,
512 U.S. 997 (1994) 28, 30

Karcher v. Daggett,
462 U.S. 725 (1983) 19

Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 10, 27, 33

Kobach v. Election Assistance Comm'n,
772 F.3d 1183 (10th Cir. 2014) 21

League of United Latin Am. Citizens (LULAC) v. Perry,
548 U.S. 399 (2006) 1, 28, 30

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639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982) 27

Miller v. Johnson,
515 U.S. 900 (1995) 34

TABLE OF AUTHORITIES
(continued)

Page

Montes v. City of Yakima,
40 F. Supp. 3d 1377 (E.D. Wash. 2014) 34

Nipper v. Smith,
39 F.3d 1494 (11th Cir. 1994) 33

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) 1

Reynolds v. Sims,
377 U.S. 533 (1964) ..... *passim*

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418 U.S. 24 (1974) 20

Romer v. Evans,
517 U.S. 620 (1996) 16

Shaw v. Hunt,
517 U.S. 899 (1996) 1, 31, 34

Shelby Cty., Ala. v. Holder,
133 S. Ct. 2612 (2013) 1

Smith v. Allwright,
321 U.S. 649 (1944) 2

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 27

Terry v. Adams,
345 U.S. 461 (1953) 2

Thornburg v. Gingles,
478 U.S. 30 (1986) 1, 28, 29, 30

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515 U.S. 737 (1995) 1

TABLE OF AUTHORITIES
(continued)

Page

Valdespino v. Alamo Heights Indep. Sch. Dist.,
168 F.3d 848 (5th Cir. 1999) 30

Veasey v. Abbott,
796 F.3d 487 (5th Cir. 2015) 22

Voinovich v. Quilter,
507 U.S. 146 (1993) 27, 31

Wesberry v. Sanders,
376 U.S. 1 (1964) 12

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403 U.S. 124 (1971) 8, 24

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422 U.S. 935 (1975) 2

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412 U.S. 783 (1973) 31

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118 U.S. 356 (1886) 1, 27

STATUTES

52 U.S.C. § 10301 ..... 27, 28

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TABLE OF AUTHORITIES
(continued)

Page

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Page

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(continued)

Page

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Page

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CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1 13

INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit legal organization, founded in 1940 under the leadership of Thurgood Marshall to achieve racial justice and ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other communities of color.

Because equality of political representation is foundational to our democracy, and the franchise is "a fundamental political right . . . preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), LDF has worked for nearly a century to combat threats to equal political participation. Indeed, LDF has been involved in nearly all of the precedent-setting cases regarding minority political representation and voting rights before federal and state courts. *See, e.g.*, *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944). Consequently, LDF has a significant interest in ensuring the full, proper, and continued enforcement of both the United States Constitution and the federal statutes guaranteeing full political participation, including the Voting Rights Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal seeks to redefine the constitutional doctrine of one person, one vote, and to upend decades of settled practice and precedent applying it. Since its recognition in *Reynolds v. Sims*, 377 U.S. 533 (1964), the one person, one vote doctrine has helped realize the constitutional promise of inclusive and equal access to this nation's representative institutions by guarding against vote dilution and ensuring that *everyone* in the population is counted when legislative districts are drawn. Ensuring state legislative districts are "as nearly of equal population as is practicable" is essential to "the basic aim of legislative apportionment": "*equal representation for equal numbers of people*, without regard to race, sex, economic status, or place of residence within a State." *Id.* at 560-61 (emphasis added).

In the half-century since *Reynolds* was announced, States have overwhelmingly sought to comply with the Equal Protection Clause by drawing legislative districts with equal *total* population. This Court has repeatedly approved that approach, and for good reason: Creating legislative districts with equal total populations fosters equal access to elec-

toral representation and constituent services, regardless of race, class, citizenship status, zip code, or other characteristics. Moreover, using total population rightly effectuates an inclusive vision of representative government in America. It permits all residents—including those who are disproportionately not yet registered to vote or who are temporarily or permanently disfranchised—to be meaningfully represented in their state and local legislative bodies. This is particularly important for underserved communities and individuals for whom access to elected representatives may be a lifeline to essential public works and constituent services.

This inclusive understanding of electoral democracy is a direct response to this country's unfortunate history of electoral exclusion. Prior to *Reynolds*, such nefarious, discriminatory, and disfranchising tactics as literacy tests, poll taxes, and outright prohibitions on suffrage caused Blacks and other racial minorities to be discounted in electoral districting and ignored by state representatives in the making of important policy decisions that impact community members' daily lives. It is only through the Civil War, key constitutional amendments, decades of litigation, and other advocacy that our country has begun to overcome these obstacles to equal access to representation.

Against this doctrinal and historical backdrop of struggle for a more inclusive democracy, Appellants advance a regressive and unprecedented interpretation of districting and constitutional law. They contend that the conclusion repeatedly reached by this Court and the vast majority of States—that "total population" means total population—is wrong. Instead, Appellants assert that the Fourteenth

Amendment *requires* States to *count out* millions of people to "equaliz[e]" the number of "eligible voters" in each electoral district. Appellants' Br. 45. Both what "eligible voter" means and how Appellants' assertion bears any relation to this Court's case law are conspicuously undefined and ill-founded.

Reynolds offers no support for Appellants' proposal because it "dealt with more than the statistical niceties involved in equalizing individual voting strength." *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973). *Reynolds* aimed to ensure "fair and effective representation," not some mathematical conception of an "equal vote," and "it was for that reason that the decision insisted on substantial equality of populations among districts." *Id.* (citation omitted). There also is no support for Appellants' position in the text of the Fourteenth Amendment (which guarantees equal protection to "any person," not "citizens," much less "voting citizens"), in any of this Court's decisions (which have explicitly and implicitly endorsed total-population districting for decades), or in any analogous State practice (which has for more than 50 years treated total population as the relevant apportionment metric). Indeed, it is difficult to identify any constitutional value that Appellants' proposal would serve.

But Appellants' theory would impose clear and considerable costs. Treating "non-voters" as invisible when drawing electoral boundaries, and therefore as unequal for purposes of representational access, would significantly harm minority communities, which are proportionally more likely to include "non-voters" such as disfranchised persons, children, immigrants, and other persons who are not yet registered or eligible to vote, many of whom are bur-

dened by increasingly onerous registration and voting requirements. Elected officials would have little incentive to be responsive to individuals who are "invisible" for apportionment purposes, particularly as districts are expanded and redrawn to make up for those who are counted *out* under Appellants' theory. As a result, vast segments of society would be fenced out of American political life and the clock would turn back to before *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and this Court's commitment to make democratic institutions more open, inclusive, and representative.

Appellants' nebulous theory of an "eligible voter" also is harmful because it hinges on the use of voting population statistics that are "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation" of specific groups. *Burns v. Richardson*, 384 U.S. 73, 92-93 (1966). Given the manipulability of voter eligibility—through such familiar means as voter registration restrictions and felon disfranchisement laws—Appellants' proposal would create perverse incentives to excise communities from the "eligible voter" population, perpetuating the types of representative inequalities that necessitated decisions like *Gomillion* and *Reynolds*. For these reasons, and others set forth below, Appellants' exclusionary proposal limiting apportionment to the imprecise and malleable category of "eligible voters" should be approached with great caution, and is, under no circumstances, constitutionally required. Indeed, this case is an inappropriate vehicle to determine if and when apportionment bases other than total population might be constitutionally permissible. There is no legislative record to allow the Court to assess the potential jus-

tifications for, or pitfalls of, that type of approach, and the Court should not attempt to provide guidance on that important question in the abstract.

Finally, a handful of *amici* supporting Appellants suggest that this Court should revamp its case law to avoid an imagined collision between the use of total population under one person, one vote and the creation of majority-minority districts under Section 2 of the Voting Rights Act ("VRA"). This collision is illusory. The plain fact is that States and localities have readily complied with both complementary commands for over 50 years, and Appellants' *amici* identify *no case* that has ever suggested the two requirements are somehow incompatible. Nor is the absence of conflict surprising. One person, one vote and Section 2 of the VRA have different constitutional foundations and functions. The former governs *how many* people should be in a district to ensure all *individuals* have equal access to representation; the latter addresses *who* should be in each district to ensure *collective* voting opportunity for particular, protected groups. There is no logical basis to insist that such fundamentally different inquiries rest on identical demographic data, and both requirements leave States and localities with considerable discretion to accommodate these and other legitimate objectives.

This Court should reaffirm the constitutionality of States' established use of total population figures when drawing legislative districts. There is no reason to depart from settled law and longstanding practice, and many compelling reasons not to.

ARGUMENT

I. APPELLANTS' PROPOSAL IS AN ABRUPT DEPARTURE FROM LONG-STANDING PRACTICE AND PRECEDENT.

The one person, one vote principle was announced as a rule of representational equality, and it has been widely understood and applied as such for more than 50 years. Over that period, legislators have almost universally relied on total population figures to draw electoral districts that are "as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. Indeed, "line-drawers across the nation rely almost uniformly on total population," an approach "that has become the de facto national policy." Joseph Fishkin, *Weightless Votes*, 121 Yale L.J. 1888, 1890 (2012). This consistent and seldom-questioned practice is not just constitutionally permissible, but *instrumental* in securing the core constitutional promise of one person, one vote—inclusive and equal access to this nation's representative institutions.

In the face of that settled law and practice, Appellants advance a sweeping constitutional proposition under the guise of "equaliz[ing] the number of eligible voters in each [electoral] district." Appellants' Br. 45.[2] Other than excluding scores of people

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[2] Indeed, as discussed below, *infra* Part II.A, it is not entirely clear what standard Appellants believe should be required to implement their proposal. Although they frame their argument in terms of "eligible voters," their preferred metric, citizen voting-age population ("CVAP"), Appellants' Br. 9, does not account for the millions of disfranchised individuals with felony convictions and many other citizens who may be ineligible to vote for any number of reasons. They also cite to registration data, *id.*, which is deeply problematic and often under-

for apportionment purposes, it is not clear what real-world interest Appellants' proposal would actually serve. As this Court has recognized, the "weight" of an individual vote is hard to define and affected by numerous factors other than a district's voting population. *See Whitcomb v. Chavis*, 403 U.S. 124, 145-46 (1971).

A. *Reynolds* Protects Equal Access to Representation.

Before *Reynolds*, legislative districts in many states were "little more than crazy quilts, completely lacking in rationality," 377 U.S. at 568, with urban areas often severely underrepresented relative to rural ones. For example, in 1960, districts in Connecticut's state house varied in population from 191 to 81,089; in Nevada, state senate districts varied from 568 to 127,016; and in California, one state senator represented six million residents of Los Angeles County while another represented 14,294 residents of three small counties. *See* J. Douglas Smith, *On Democracy's Doorstep* 47, 287 (2014).

Malapportionment was a particularly malignant tool for disfranchisement in the South before *Reynolds*. *See Controversies in Minority Voting: The Voting Rights Act in Perspective* 31 (Bernard Grofman & Chandler Davidson, eds. 1992) ("As post-Reconstruction historiography makes clear, one form of minority vote dilution employed by southern whites was malapportionment. . . . *Reynolds* destroyed this as a legal option for whites in the Deep

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inclusive for other reasons. And, of course, neither CVAP nor registered voters has much to do with the concept of an "equal vote," which can be affected by voter turnout and barriers to registration.

South immediately before the Voting Rights Act enfranchised blacks there the following year."). In Georgia, for instance, just 1,876 people comprised the smallest house district, while the largest had a population of 185,422, roughly 100 times greater. Smith, *supra*, at 287.

As a result of such disparities, State policies tended to disproportionately serve the interests of sparsely populated rural areas, often at the expense of their more populous urban counterparts. As this Court summarized in *Reynolds*, "a nation once primarily rural in character [became] predominantly urban," and "[r]epresentation schemes once fair and equitable [became] archaic and outdated." 377 U.S. at 533.

Reynolds rejected these persistent representational imbalances, holding that, to avoid "schemes which give the same number of representatives to unequal numbers of constituents," *id.* at 563, "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568. "Legislators," this Court instructed, "represent people, not trees." *Id.* at 562. With that command, States redrew decades-old electoral boundaries, giving greater representation to urban areas whose political voices had previously been artificially muted. *See* J. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 Mich. L. Rev. 1, 91 (1984) (noting "immediately observable marked increases in urban and suburban representation" following *Reynolds*). Over time, government policies and programs that had disproportionately favored rural areas shifted to also accommodate urban interests. *See, e.g.*, M. McCubbins &

T. Schwartz, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 Am. J. Pol. Sci. 388, 395-400, 409-12 (1988) (documenting such a shift in federal policy following one person, one vote cases). Put otherwise, the rule in *Reynolds* profoundly enhanced the representation and political access of urban communities—and, in so doing, of communities of color.[3]

Given that profound transformation, this Court was clearly correct when it observed that *Reynolds* "dealt with more than the statistical niceties involved in equalizing individual voting strength." *Gaffney*, 412 U.S. at 748. Rather, "*Reynolds* recognized that 'the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment.'" *Id.* (quoting *Reynolds*, 377 U.S. at 565-66) (ellipsis in original). And "*it was for that reason* that the decision insisted on substantial equality of populations among districts." *Id.* (emphasis added). This Court did not mandate population equality to achieve some platonic mathematical ideal of an "equal vote," but to ensure fair and adequate access to representation to all persons within our nation's boundaries. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power *and* diminution

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[3] *See* K. Johnson, *Demographic Trends in Rural and Small Town America* 24, fig. 17 (Carsey Inst., Univ. of New Hampshire, 2006) ("[T]he proportion of the rural population that is non-Hispanic white (82 percent) is higher than in metropolitan areas (66 percent)."), *available at* http://scholars.unh.edu/cgi/viewcontent.cgi?article=1004&context=carsey.

of access to elected representatives.") (emphasis added).[4]

B. Consistent Precedent and Practice Confirm That *Reynolds* Protects Equal Access to Representation.

It is hardly surprising, then, that this Court has rejected Appellants' proposal to *mandate* a particular population metric and has instead permitted states to select from a range of approaches, including the near-universal practice of drawing districts by reference to total population. *See Burns*, 384 U.S. at 92.

That conclusion is confirmed by this Court's adjudication of case after case in which districts were drawn using total population metrics, without so much as a hint that the practice could be viewed as improper. *See Bd. of Estimate of City of N.Y. v. Morris*, 489 U.S. 688, 700 (1989) (discussing "formula that [the Court] ha[s] utilized without exception since 1971" and citing cases analyzing total population). Even when confronted with districts in which total population did not neatly mirror the voting population, this Court held only that such anomalies could *justify* districts with deviations from popula-

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[4] Indeed, the goal of representational equality predates *Reynolds* and is consistent with the intent of the Fourteenth Amendment. For example, Senator Jacob Howard's comprehensive speech introducing that Amendment explained that "[t]he committee adopted numbers," *i.e.* total population, "as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers. Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2767 (1866).

tion equality, *see Gaffney*, 412 U.S. at 746-47, or the use of alternative population measures, *see Burns*, 384 U.S. at 94-97; it never stated or implied that such circumstances *require* the use of a particular population metric. Appellants' failure to identify any such requirement in half a century of jurisprudence belies their newfound insistence that districts drawn using total population violate "their fundamental right to an equal vote." Appellants' Br. 18.

Finally, the validity of the total population benchmark is reinforced by the rules governing congressional redistricting. Article I, Section 2 *affirmatively requires* that congressional districts be drawn to equalize *total population*. *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964). That provision reflects the constitutional permissibility of basing political representation on total population, and not voters alone. Appellants have not explained why a constitutionally permissible metric for congressional apportionment is an inappropriate choice for state legislatures to rely on for their own districts.

And while this Court's subsequent cases have held that the equal population principle applies *more flexibly* at the state level, *see, e.g.*, *Gaffney*, 412 U.S. at 744-46, they have never suggested that "what is constitutionally required for apportionments for the House of Representatives is constitutionally forbidden in apportionments for state and local legislative bodies." Brief for the United States in Opposition at 16, *Cty. of L.A. v. Garza*, 498 U.S. 1028 (1991) (No. 90-849).

Rightly so. Total population represents the most inclusive and democratic basis for legislative apportionment—one that ensures equal access to repre-

sentation for all, without regard to the number of voters or non-voters in a given geographic area. It confers equal, meaningful representation on an individual who is not registered to vote, a sixteen-year-old child, a lawful permanent resident, and a disfranchised person. *See, e.g.*, *Calderon v. City of L.A.*, 481 P.2d 489, 493 (Cal. 1971) ("Adherence to a population standard . . . is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government."). For these reasons, apportionment using total population is fully faithful to the doctrine's purpose to expand "fair and effective representation for all," *Reynolds*, 377 U.S. at 565-66, and to the Fourteenth Amendment's guarantee of equal protection of the laws to "*any* person." U.S. Const. amend. XIV, § 1 (emphasis added).

II. APPELLANTS' PROPOSAL WOULD FENCE OUT HISTORICALLY DISFAVORED AND UNDERSERVED COMMUNITIES, AND THEREFORE RAISES CONSTITUTIONAL CONCERNS.

The Court need not, and should not, go any further than reaffirming States' authority to use total population as the basis for redistricting. This case does not require the Court to address whether, and when, States might be constitutionally permitted to utilize metrics focusing on "eligible voters" or any other metric apart from the total population standard Texas actually used. And the Court should not attempt to resolve that hypothetical and abstract question in this case. This case lacks any legislative record or other context that would allow for informed and informative guidance on when States might be permitted to deviate from total-population appor-

tionment. Nor does this Court, in the absence of a legislative record, have any basis for anticipating what constitutional issues might arise if a legislature were to abandon its historic practice of using a total population standard. In *Burns*, this Court held that the registered-voter metric used there was acceptable, despite the Court's serious reservations about its propriety, "*only because on th[at] record*" that approach was found to have produced a result "not substantially different from that which would have resulted from the use of a permissible population basis." 384 U.S. at 93 (emphasis added). The only record evidence in this case is a conclusory two-page declaration. Appellees' Br. 5-6. In short, *Burns* makes clear that evaluating the permissibility of non-population-based metrics requires a relevant record, and none exists here.

If the Court nonetheless attempts to provide guidance in this area, it should make clear that such voter-based metrics should be approached with great caution. In contrast to using total population for apportionment, a system that focuses on Appellants' nebulous definition of "eligible voters" would treat certain groups as invisible for purposes of legislative districting, and, by extension, as outsiders for purposes of democratic representation. Because the very concept of an "eligible voter" is difficult to define and devoid of a solid conceptual or statistical foundation, it is ripe for political manipulation. This potentially invidious combination of exclusion and political malleability raises sufficiently significant constitutional red flags that the use of "eligible voter" metrics cannot be required.

A. This Court's Jurisprudence Protects Against the Fencing Out of Select Communities.

Beginning with *Gomillion*, 364 U.S. at 339, the persistent trend in this Court's jurisprudence has been to make this country's representative institutions more open and inclusive, not less so. In *Gomillion*, this Court reviewed a challenge to the Alabama City of Tuskegee's borders, which had been redrawn "to remove from the city all save only four or five of its 400 negro voters while not removing a single white voter or resident." *Id.* at 341. This Court unanimously rejected the new boundaries, which it described as having the effect of "fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.* "It is inconceivable," this Court affirmed, "that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Id.* at 345 (citation omitted); *see generally* Brief for Petitioners, *Gomillion v. Lightfoot*, 364 U.S. 339, 1960 WL 98593 at **11-12 (Aug. 25, 1960) (then-LDF counsel Robert L. Carter and others argued "'evasive schemes' designed to achieve the same result [as express prohibitions on voting qualifications or other geographic restrictions] are similarly forbidden [under the Fourteenth and Fifteenth Amendment]").

Following *Gomillion*, this Court's decisions have repeatedly rejected the "fencing out" of discrete groups from the political process, and explained that the Fourteenth Amendment mandates inclusive and accessible democratic institutions. *See, e.g.*, *Reynolds*, 377 U.S. at 560-61; *Carrington v. Rash*, 380 U.S. 89, 96 (1965); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966). As this Court has

instructed, "[c]entral . . . to the . . . Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). In other words, laws that tend to "fence out" discrete groups from access to representation and government are "not within our constitutional tradition." *Id.*

Reynolds and other, similar cases have barred the most blatant and overt forms of exclusion from the democratic process. But, as this Court has previously recognized, making "eligible voters" the *sine qua non* of apportionment poses similar concerns about exclusion. *See, e.g.*, *Burns*, 384 U.S. at 92-93.

Appellants' proposed scheme for redistricting seeks to count out underserved groups—like persons not yet registered to vote, children, immigrants, and disfranchised persons—and would impose considerable and concrete harms. *Cf. Anderson v. Celebreeze*, 460 U.S. 780, 793 (1983) ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."). As the pre-*Reynolds* era showed, this sort of underrepresentation has real-world consequences, *see supra* at 8-10, since the excluded constituents are less fully and faithfully represented in the legislative process, resulting in policies that are less attentive to local needs and concerns.[5] *See* Choper, *supra*, at 94 (not-

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[5] Today, urban areas account for 80.7% of the U.S. population. U.S. Census, Growth in Urban Population Outpaces Rest of Nation, Census Bureau Reports (Mar. 26, 2012), *available at* https://www.census.gov/newsroom/releases/archives/2010_census/cb12-50.html.

ing that prior to *Reynolds* urban dwellers' "political influence had been seriously diluted by entrenched minority interests"); David C. Saffell, *Reapportionment and Public Policy: State Legislators' Perspectives*, 9 Poly. Stud. J. 916, 921 (1981) (observing a "large number of single state studies conclude that reapportioned states became more responsive to urban needs" following *Reynolds*).

More problematically still, this derogation of representative equality will fall most heavily on Black residents, immigrants, and other communities that already face historical and contemporary discrimination. In Black communities, for example, there are over 20 million people who are not "eligible voters,"[6] including about 13 million Black children,[7] nearly 5 million non-registered Black voters,[8] 2 million Black non-citizens,[9] and 2 million Black individuals with felony convictions.[10] Under Appellants' "eligible vot-

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[6] Notably, with the exception of the figure for felony convictions, these figures do not include institutionalized persons, and, thus, are merely a floor.

[7] U.S. Census, Tbl. 29, Population by Sex and Age, for Black Alone or in Combination and White Alone, Not Hispanic (2012), *available at* https://www.census.gov/population/race/data/ppl-bc12.html.

[8] U.S. Census, Tbl. 2, Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age (Nov. 2014), *available at* https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2014/tables.html.

This number does not account for an additional and nearly 6 million Black persons who did not know or did not identify if they are registered voters. *Id.*

[9] *Id.*

[10] Christopher Uggen et al., *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, 17, Tbl. 4 (July

er" approach, such individuals would be largely "fenced out" in ways this Court has rejected for decades.

That exclusion has tangible consequences that cannot be overlooked. For example, Black children disproportionately live in property and face substantial barriers to education and health services.[11] And black families and adults face seriously diminished life expectancies, health outcomes,[12] and economic prospects.[13] Addressing these serious problems requires access to State and local representatives, which would be diminished under Appellants' proposal to apportion representatives based on "eligible voters." As this Court has warned, population measures that "operate[] to the detriment of the poor, blacks, Mexican-Americans, and American Indians" are allowable only under limited circumstances. *Ely v. Klahr*, 403 U.S. 108, 115 n.7 (1971) (quoting *Burns*, 384 U.S. at 92)).

2012), *available at* http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

[11] Thirty-nine percent (39%) of Black children under 18 years of age, as compared to 13% of white children, lived in poverty in 2013, more than any other racial/ethnic group. Nat'l Ctrs. for Educ. Statistics, Children Living in Poverty, at 3, *available at* https://nces.ed.gov/programs/coe/pdf/coe_cce.pdf.

[12] *See, e.g.*, Ctrs. for Disease Control and Prevention, *Healthy life expectancies at age 65 highest in Hawaii, lowest in Mississippi* (July 18, 2013), *available at* http://www.cdc.gov/media/releases/2013/p0718-life-expectancy.html.

[13] *See, e.g.*, Alan Huffman, *How White Flight Ravaged the Mississippi Delta*, The Atlantic (Jan. 6, 2010), *available at* http://www.theatlantic.com/business/archive/2015/01/how-white-flight-ruined-the-mississippi-delta/384227.

Appellants' proposed "eligible voter" standard is also suspect because it is primed for political manipulation. There is no clear definition of "eligible voters," and the process of giving that term meaning creates abundant opportunity for gamesmanship, as Appellants' own brief shows. Appellants most often suggest that "eligible voters" be counted using CVAP, Appellants' Br. 18, but alternatively suggest that voter registration numbers might form an alternative benchmark, *id.* at 9. That lack of definition will create opportunities for invidious manipulation. For example, voting-age adults in urban areas register to vote at lower rates than their rural counterparts, *see* Kimball W. Brace, Final Report of the 2004 Election Day Survey 2-12 (2005); those adults who do not register are counted toward an area's CVAP, but obviously are not included in its voter-registration figures. The use of voter-registration numbers therefore would indicate a lower "eligible voter" population than CVAP, providing improper incentives to legislators who might prefer to reduce that area's representation. By contrast, total population is easy to define and can be readily quantified using decennial census figures. *See Karcher v. Daggett*, 462 U.S. 725, 738 (1983) ("[T]he census data provide the only reliable—albeit less than perfect—indication of the districts' 'real' relative population levels.").

For these reasons, this Court warned in *Burns* that apportionment based on registered or actual voter numbers is "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process or perpetuate a 'ghost of prior malapportion-

ment.'" 384 U.S. at 92-93. But unless this Court is prepared to hold that the Constitution requires the use of CVAP or some similar measure to count "eligible voters," Appellants' conception of "eligible voters" would routinely open the door to such abuses.

Even once legislators choose a standard for "eligible voters," they could further manipulate apportionment through laws that alter the size and composition of the "eligible voter" population. The possibility is well-illustrated by felon disfranchisement laws. State legislatures have latitude to restrict or eliminate the voting rights of people with felony convictions, *see Richardson v. Ramirez*, 418 U.S. 24 (1974), and they do so in numerous ways: Nearly all states prohibit voting by those incarcerated for felony offenses; many deny the vote to individuals on probation or parole; and many states prescribe cumbersome processes for restoration of voting rights to ex-offenders. *See* Developments in the Law, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939, 1942-43 (2002); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 Case W. Res. L. Rev. 727, 767 (1998).

As a result of those laws, over 2.2 million Black Americans are ineligible to vote—fully 7.66% of Black adults. Christopher Uggen et al., *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, 17, Tbl. 4 (July 2012).[14] Such restrictions directly vitiate the voting power of the racial minority groups and the economically disadvantaged groups from which individuals with felony

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[14] *Available at* http://felonvoting.procon.org/sourcefiles/2010_State_Level_Estimates_of_Felon_Disenfranchisement.pdf.

convictions disproportionately hail. *See, e.g.*, Uggen & Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Soc. Rev. 777 (2002). But under certain "eligible voter" apportionment regimes—ones based on voter registration, for example, *see* Appellants' Br. 9-12—disfranchised individuals with felony convictions would not even be counted as part of a district's population in the first place, further diminishing the representative access and influence of the communities to which they belong.[15]

Voter registration restrictions create similar potential for manipulation. Efforts to make voter registration more difficult by, for example, imposing documentation requirements, such as photo identification or proof of citizenship, are an unfortunate reality of contemporary American democracy. *See Kobach v. Election Assistance Comm'n*, 772 F.3d 1183, 1199 (10th Cir. 2014) (denying States' request to include documentary proof of citizenship language on federal voter registration form); *see also* Jim Bennett, Alabama Secretary of State, *Bennett Says Alabama will Implement Voter Citizenship Requirement* (Dec. 19, 2014) (following the *Kobach* decision, the State declaring its intent to proceed with implemen-

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[15] In Florida and Kentucky, for instance, which *permanently* bar people with felony convictions from voting, Appellants' framework risks excluding 23% (more than half a million) and 22% (more than 50,000) of the respective Black populations in those States, from the very representation that those individuals need to reintegrate into their communities and access jobs, health services, education, and more following incarceration. Christopher Uggen et al., *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, 17, Tbl. 4 (July 2012), *available at* http://felonvoting.procon.org/sourcefiles/2010_State_Level_Estimates_of_Felon_Disenfranchisement.pdf.

tation of proof of citizenship for new voters).[16] Such burdens, too, disproportionately affect racial minorities, low-income residents, and other communities that often lack the opportunity or resources to easily comply with heightened registration and voting requirements. *Cf. Veasey v. Abbott*, 796 F.3d 487, 505-07 (5th Cir. 2015) (affirming finding that documentary voting requirements disproportionately affect low-income voters and racial minorities, including more than 600,000 registered voters and one million eligible voters, overwhelmingly Black and Hispanic in Texas). Apportionment schemes based on voter registration, therefore, constitute yet another mechanism by which legislators could reduce the representative access of poor communities and people of color under Appellants' proposal.

This Court has "underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests or which will necessarily tend to favor . . . less populous districts over their more highly populated neighbors." *Abate v. Mundt*, 403 U.S. 182, 185-86 (1971); *see also Gray v. Sanders*, 372 U.S. 368, 379 (1963) (striking down, even before *Reynolds*, a voting scheme that assigned greater electoral power to less densely populated rural areas to the detri-

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[16] *Available at http://www.sos.alabama.gov/pr/pr.aspx?ID=9330*; *see also* Brennan Center for Justice at NYU School of Law, Citizens Without Proof (2006), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf (reporting that 13 million individuals lack ready access to proof of citizenship documents like passports, naturalization papers, or birth certificates and more than 5.5 million (or 25%) of Black voting-age citizens lack current government issued photo ID).

ment of urban areas). Although drawing electoral lines based on voting metrics may, in limited circumstances, be permissible, this Court's repeated warnings make clear that the practice is to be approached with great caution, and is, under no circumstances, constitutionally required. *Abate*, 403 U.S. at 185-86; *Ely*, 403 U.S. at 115 n.7.

B. Appellants' Proposal Does Not Have a Constitutional Value That Justifies Its Deleterious Effect on Representational Equality.

In light of its harmful effects, the use of an "eligible voter" apportionment model that is easy to manipulate would be questionable even if it advanced some identifiable constitutional purpose. But it does not.

Although Appellants assert a right to an "equal vote" that is not "diluted," Appellants' Br. 14, and a right to a vote that "'counts as much . . . as any other person's,'" *id.* at 16 (quoting *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 54 (1970)), they provide no meaningful proposal for measuring "an equally weighted vote," *id.* at 26, much less equal representation. Instead, they proceed entirely on the assumption that "an equally weighted vote" means only one thing—a vote cast in a district with the same number of "eligible voters" as other districts. *See, e.g.*, *id.* at 3, 15. But that circular argument—which Appellants never even attempt to justify—is entirely question-begging and unmoored from this Court's precedents.

Appellants' proposal collapses under even the most cursory of scrutiny. Neither individual voters nor groups of voters benefit in any tangible way from districts with equal numbers of "eligible voters." A

vote's weight in an election turns on a host of variables other than district size, including a district's partisan constituency, competitiveness, and voter turnout. Since many variables are more important to a vote's real-world impact than "eligible voter population," Appellants' idea of an "equal vote" has no obvious real-world or theoretical significance. *See generally* Joseph Fishkin, *Weightless Votes*, 121 Yale L.J. 1888 (2012). It also lacks a *constitutional* significance that might justify the representational harms that Appellants' theory would inflict.

This Court's precedents confirm the point. In *Whitcomb*, this Court rejected a theoretical model of "voting power" that ignored "the quality or effectiveness of representation later furnished by the successful candidates." 403 U.S. at 145; *id.* at 168 (Harlan, J., concurring in part and dissenting in part). This Court held that model irrelevant to one person, one vote analysis because "the position remains a theoretical one and . . . does not take into account any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation." *Id.* at 145-46 (opinion of the Court) (quotation and footnote omitted). *See also Morris*, 489 U.S. at 697, 699 (again rejecting a theoretical model of equal "voting power" and explaining equal population, not statistical abstraction, is the relevant touchstone for compliance with one person, one vote).

This case warrants yet more skepticism than *Whitcomb* and *Morris*. Appellants' circular conception of an "equal vote" is even weaker than those previously rejected by this Court, and suffers from

the same glaring weaknesses—*viz.*, it is completely blind to the factors that actually determine a vote's real-world impact. Appellants fail to demonstrate that their set of new standards would benefit any voter anywhere in any way. But their proposal's potential harms to representational access and the dignity of Blacks and other racial minorities are crystal clear. They cannot be justified by such unprecedented and hollow suppositions about the "right to an equal vote." Appellants' Br. 18.

III. THERE IS NO CONFLICT BETWEEN ONE PERSON, ONE VOTE AND SECTION 2 OF THE VOTING RIGHTS ACT.

Although this case plainly does not arise under Section 2 of the VRA—passed only a year after this Court's decision in *Reynolds*—a handful of *amici curiae*[17] insist that this Court must resolve a "bloody crossroads" between that provision and one person, one vote jurisprudence. Cato Juris. Br. 4. CVAP data may be used (as just one of many factors) to prove and devise remedies for Section 2 violations. Accordingly, these *amici* suggest, CVAP data should also govern constitutional challenges under one person, one vote, lest jurisdictions "navigating between the VRA's Scylla and the Constitution's Charybdis . . . wreck individual rights . . . on judicial shoals." *Id.* at 2.

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[17] *See* Brief of the Cato Institute and Reason Foundation as *Amici Curiae* Supporting Appellants ("Cato Br."); Brief of the Cato Institute and Reason Foundation as *Amici Curiae* Supporting Appellants' Jurisdictional Statement ("Cato Juris. Br."); Brief for Project 21 as *Amicus Curiae* in Support of Appellants ("Project 21 Br."); Brief of the City of Yakima, Washington as *Amicus Curiae* Supporting Appellants ("Yakima Br.").

This is wrong in principle and practice. For one, *amici* would incorrectly have this Court construe a *constitutional* requirement in light of a perceived and later-in-time *statutory* requirement. Moreover, there is a reason why one person, one vote and Section 2 have coexisted for 50 years without any splintered hulls: the two doctrines address fundamentally different concerns. The former governs *how many* people should be in a district to ensure representative equality; the latter addresses *who* should be in each district to ensure collective voting opportunity for particular, protected groups. Those distinct concerns permit, and may often require, different demographic data to be used in different ways: Whereas one person, one vote looks to total population to ensure that districts are equally populous, Section 2 permits the use of CVAP as one of many measures to ensure that a geographically cohesive minority group is given the opportunity to elect candidates of its choice and participate equally in the political process in the presence of racially polarized voting. There is no logical basis to insist that such fundamentally different inquiries rest on identical demographic data.

A. In Principle, There Is No Conflict Between One Person, One Vote and Section 2.

Section 2 of the VRA and the Fourteenth Amendment's equal population guarantee promote political equality through complementary yet distinctive standards. While these standards overlap in their ultimate aim, they embody different rights, are directed to individuals in distinct groups, and play fundamentally different roles in fostering a well-functioning political process. Thus, it is no surprise

that these guarantees may at times focus on different demographic data.

The one person, one vote doctrine is grounded squarely in the Equal Protection Clause. *See Reynolds*, 377 U.S. at 566. Consistent with the Fourteenth Amendment's guarantee of equal protection to all *persons*, *Yick Wo*, 118 U.S. at 356, the equal population principle broadly protects "the fundamental principle of representative government . . . of equal representation for equal numbers of people." *Reynolds*, 377 U.S. at 560-61; *Kirkpatrick*, 394 U.S. at 526 ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."); *supra* Part I.

By contrast, the VRA derives from Congress's power to enforce the Fourteenth and Fifteenth Amendments. *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966); *see also Voinovich v. Quilter*, 507 U.S. 146, 152 (1993); *Lodge v. Buxton*, 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982). The Fourteenth Amendment prohibits a voting scheme "'conceived or operated as [a] purposeful device[] to further racial discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers*, 458 U.S. at 617. The Fifteenth Amendment ensures that the right to vote "shall not be denied or abridged" "on account of race" or "color." Section 2 thus focuses on a minority group's ability to "elect representatives of their choice" and participate equally in the political process. 52 U.S.C. § 10301(b). Its goal is to maintain fairness and equality of opportunity in the political process by examining the *aggregate* voting power of individuals in

a minority group: Section 2 ensures that when a State exercises its discretion to reapportion or use an electoral scheme, it does not diminish a minority group's "potential to elect" its preferred representatives. *Gingles*, 478 U.S. at 50 n.17 (1986) (emphasis omitted).

To that end, courts adjudicating Section 2 challenges often consider additional measures beyond total population like voting-age population ("VAP") and/or CVAP data at the liability stage to determine whether individuals in a protected minority group are sufficiently large and cohesive that they *could* exercise their *voting* power to elect candidates of their choice.[18] VAP, CVAP, and/or other data also may be relevant at the remedial phase to ensure that the proposed remedy can secure that group's potential to elect its preferred representatives.

Different tasks require different data. One person, one vote aims to ensure representational equality for all persons protected by the Fourteenth Amendment; Section 2 aims to ensure actual electoral opportunity for individuals in a particular minority voting group as an implementation of the Fourteenth and Fifteenth Amendments. Thus, far from being in conflict, Section 2 complements the equal population principle by ensuring State apportionment schemes do not undermine the opportunity

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[18] Courts can and do choose from a wide variety of population bases in answering the question of whether individuals in a minority population are "sufficiently large" to constitute a majority in a district. *See, e.g.*, *Johnson v. DeGrandy*, 512 U.S. 997, 1008-10 (1994) (expressly declining to decide which measure should be used to establish a population measure); *see also LULAC*, 548 U.S. at 429 (affirming use of CVAP); *Bartlett v. Strickland*, 556 U.S. 1 (2009) (consistently referring to VAP).

of individuals in a protected group to elect candidates of their choice. *See Gaffney*, 412 U.S. at 751 ("A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'" (quoting *Forston v. Dorsey*, 379 U.S. 433, 439 (1965))). Given these fundamental differences, it would be unreasonable to require that these two doctrines be measured against the same standard.

B. In Practice, There Is No Conflict Between One Person, One Vote and Section 2.

Amici contend that if one person, one vote and Section 2 are construed to rely on different population bases, the two standards would inevitably conflict: Districts drawn with CVAP data to comply with Section 2 would violate one person, one vote and *vice versa*. *See, e.g.*, Cato Br. 33-35. This argument misunderstands how the two standards operate in practice. In reality, there is no such conflict.

Under *Gingles*, plaintiffs (members of a minority group) must make a three-part, threshold showing in proving a Section 2 vote-dilution claim: (1) they must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) they must be "politically cohesive" ; and (3) the majority must vote "sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 478 U.S. at 50-51. Although this Court has never expressly required the use of any particular set of data to determine if the first *Gingles* factor is satisfied,

some courts of appeals have determined CVAP is the appropriate population base when considering the size and cohesion of voting blocs in a Section 2 analysis.[19]

But while CVAP (or some other) data can satisfy that factor, that is not enough to establish a Section 2 violation. "[W]hen a party has established the *Gingles* requirements . . . a court proceed[s] to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009). These circumstances can include the extent to which voting is racially polarized, proportionality between the number of districts in which members of the protected group form an effective majority and the group's share of the population in the relevant area, the state's history of voting-related discrimination, and the extent to which members of the minority group are elected to political office in the challenged jurisdiction. *See, e.g.*, *LULAC*, 548 U.S. at 426; *Bartlett*, 556 U.S. at 29. Thus, CVAP and other data are small pieces of a much larger evidentiary puzzle in the Section 2 context. *See Johnson v. DeGrandy*, 512 U.S. 997, 1020-21 (1994) ("No single statistic provides courts with a shortcut to determine whether" a state districting scheme "unlawfully dilutes minority voting strength.").

Nor does CVAP, or some other data dictate any particular remedy. States and local jurisdictions, which generally are afforded the first opportunity to

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[19] *See, e.g.*, *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999) (considering VAP and CVAP); *Barnett v. City of Chi.*, 141 F.3d 699, 704-05 (7th Cir. 1998) (using CVAP).

exercise their political judgment as to how to remedy Section 2 violations, *White v. Weiser*, 412 U.S. 783, 794-96 (1973), "retain broad discretion in drawing districts to comply with the mandate of § 2." *Shaw*, 517 U.S. at 917 n.9. Because "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), Section 2 remedies may properly account for legitimate State policies, provided that the remedy ultimately ensures that members of a minority group have the potential to elect their preferred candidates. *See Voinovich*, 507 U.S. at 156; *accord Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 670 (5th Cir. 2009) ("Courts are expected, in evaluating redistrict plans, to take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." (quotation and citation omitted)). Consequently, CVAP (or some other) data need not be the driving force behind remedial redistricting[20]; indeed, a State might constitutionally employ an electoral scheme that eschews districts altogether.[21] And even if CVAP data is used, there al-

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[20] The dispute in *Garza*, for instance, arose from the use of total population data to remedy a Section 2 violation. *Garza v. Cty. of L.A.*, 918 F.2d 763, 773-75 (9th Cir. 1990); *see also Fabela v. City of Farmers Branch, Tex.*, No. 10-1425, 2012 WL 3135545, at *6 n.13 (N.D. Tex. Aug. 2, 2012) ("Regarding defendants' one-person, one-vote challenge, among the options available to Farmers Branch to remedy a § 2 violation is to draw single-member districts based on total population.").

[21] Because "geographic districting is not a requirement inherent in our political system," *Holder v. Hall*, 512 U.S. 874, 911 (1994) (Thomas, J., concurring); *id.* at 910 n. 17 (observing that "cumulative voting in an at-large system has been employed in some American jurisdictions"), there is nothing that would prevent a State from adopting, for example, a system of cumulative or limited voting to remedy a Section 2 violation.

ways remains "more than one way to draw a district." *Chen v. City of Houston*, 206 F.3d 502, 519 (5th Cir. 2000).[22]

States' considerable "flexibility" in implementing one person, one vote, *Reynolds*, 377 U.S. at 579, provides ample constitutional latitude to craft Section 2 remedies. The Equal Protection Clause does not mandate rigid population equality for state reapportionment; rather, deviations of up to 10% are constitutionally permissible, as States are afforded significant leeway to accommodate other legitimate government interests. *See Brown v. Thomson*, 462 U.S. 835, 852 (1983). Even deviations above 10% may be constitutional if not significantly greater than neces-

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See Branch v. Smith, 538 U.S. 254, 310 (2003) (O'Connor, J., concurring in part and dissenting in part) ("a court could design an at-large election plan that awards seats on a cumulative basis, or by some other method that would result in a plan that satisfies the Voting Rights Act"); *see also* Yakima Br. 25.

[22] *Dillard v. Town of Louisville*, 730 F. Supp. 1546 (M.D. Ala. 1990), illustrates perfectly how Section 2's remedial flexibility operates to avoid any potential conflict with the Fourteenth Amendment. There, the town of Louisville, Alabama proposed a remedial plan containing two non-contiguous majority-minority districts because current population distribution meant that no single-member districting scheme could be devised that remedied the Section 2 violation, complied with one person, one vote, and consisted only of contiguous districts. *Id.* at 1549. Observing that courts "should be flexible and should not seek to apply rigid, abstract formulas divorced from reality," the *Dillard* court held that, based on the totality of circumstances, the plan fulfilled the town's obligations under Section 2 and the Equal Protection Clause while meeting the town's "practical needs" and accommodating "a sense of community within each district." *Id.* at 1549-50; *see also Dillard v. Chilton Cty. Bd. of Educ.*, 699 F. Supp. 870, 876 (M.D. Ala. 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1989).

sary to serve legitimate State concerns. *Id.*; *Abate*, 403 U.S at 185. This mutually reinforcing flexibility means that States do not have to thread the needle to comply with Section 2 and one person, one vote.

Indeed, an actual conflict is exceedingly farfetched—if not impossible. The numerous briefs filed by *amici* advancing this argument have failed to cite a single case, in more than 50 years since the passage of the VRA, where a remedial plan conflicted with the equal population requirement. And there does not appear to be a single example of such a conflict under the Constitution's less flexible requirements for congressional apportionment, which require near-absolute fidelity to population equality, *Kirkpatrick*, 394 U.S. at 530-31. What *amici* curiously refer to as a "bloody crossroads," *see* Cato Juris. Br. 4, in fact presents no real conflict at all.

Moreover, even if this imaginary contingency somehow became real, the solution to *amici*'s hypothetical "conflict" would be simple: There would be no conflict because Section 2 does not authorize a state to violate the Fourteenth Amendment. In other words, a constitutional remedy is a necessary part of a Section 2 claim. *See Holder v. Hall*, 512 U.S. 874, 880 (1994) ("In a § 2 vote dilution suit, along with determining whether the *Gingles* preconditions are met and whether the totality of the circumstances supports a finding of liability, a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." (footnote omitted)); *Nipper v. Smith*, 39 F.3d 1494, 1533 (11th Cir. 1994) (en banc) ("The absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes, under the totality of the circumstances inquiry, a

finding of liability."); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1399 (E.D. Wash. 2014) ("[I]f the plaintiff proves by a preponderance of the evidence that a workable remedy can be fashioned, the first *Gingles* precondition is satisfied."). Because a plaintiff could not state a viable Section 2 claim where the only remedy would require violating the Equal Protection Clause, there could be no conflict.[23]

CONCLUSION

What this Court said in *Reynolds* remains true: "as a basic constitutional standard, the Equal Protection Clause requires that the seats must be apportioned on a population basis." 377 U.S. at 568. The "fundamental principle of representative government is one of equal representation for equal numbers of people." *Id.* at 560-61.

Appellants' sweeping new theory, centered on the indeterminate concept of "eligible voters," risks "fencing out" Black people and other communities of color from this country's representative institutions. The ultimate, disastrous result would be two classes of people: those who count for purposes of representation and redistricting, and those who do not. This Court should reject Appellants' theory and reaffirm the principle enshrined in 50 years of practice and

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[23] *Amicus* Project 21 suggests that inconsistent standards under Section 2 and one person, one vote might foster Equal Protection violations by affording additional opportunities to engage in "race-conscious decision-making in drawing majority-minority districts." Project 21 Br. 17. But as *amicus* apparently acknowledges, this Court has already set sharp limits on the use of race in remedial redistricting. *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

precedent—that representative government serves all persons within our nation's boundaries equally.

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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